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No. 01-1467

In the
SUPREME COURT OF THE UNITED STATES

Missouri Republican Party, *et al.*,
Petitioners,

v.

Robert F. Connor, *et al.*,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under *Buckley v. Valeo* and *Nixon v. Shrink Missouri Government PAC*, a district court errs in granting summary judgment in a case challenging one part of a comprehensive set of campaign contribution limits when undisputed evidence shows that the limits did not significantly change the ability of candidates to obtain the funds they need to speak.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

CONCLUSION 9

APPENDIX 10

Table of Contents ..... A-i

TABLE OF AUTHORITIES

CASES **Page**

Buckley v. Valeo,
424 U.S. 1 (1976) 3-5

Citizens for Responsible Government v. Buckley,
60 F. Supp. 2d 1066 (D. Colo. 1999) 6

Citizens for Responsible Government v. Davidson, 236 F.3d 1174 (10th Cir. 2000) 6

City of Renton v. Playtime Theatres, Inc.,
475 U.S. 41 (1986) 7

Colorado Republican Campaign Comm. v. FEC,
518 U.S. 604 (1996) 5, 6, 8

Federal Election Commission v. Colorado Republican Federal Campaign Committee,
533 U.S. 431 (2001) 5, 7

Landell v. Sorrell,
118 F. Supp. 2d 459 (D. Vt. 2000) 6

Lorillard Tobacco Co. v. Reilly,
533 U.S. 525 (2000) 6, 7

Nixon v. Shrink Missouri Government PAC,
528 U.S. 377 (2000) 2-8

State of Alaska v. Alaska Civil Liberties Union,
978 P.2d 597 (Alaska 1999),
cert. denied 528 U.S. 1153 (2000) 6

STATUTES

Mo. Rev. Stat. § 130.032.2 (2000) 2

Mo. Rev. Stat. § 130.032.4 (2000) 1, 2

Mo. Rev. Stat. § 130.032.7 (2000) 1

OTHER AUTHORITIES

Fed. R. Civ. P. 56 4

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STATEMENT OF THE CASE

In the waning days of Missouri's 1998 campaigns, four candidates filed reports with the Missouri Ethics Commission showing that they had accepted contributions from the Missouri Republican Party that exceeded Missouri's limits on party committee contributions, found in Mo. Rev. Stat. § 130.032.4 (2000). The Commission quickly began the enforcement process provided by Mo. Rev. Stat. § 130.032.7 (2000). One of the candidates complied with the law and refunded the excess contribution. The others, with their treasurers and the Missouri Republican Party, instead filed this suit. The suit was held in abeyance, with enforcement preliminarily enjoined, awaiting a

decision in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000) (*Shrink Missouri*).

The limits at issue here apply only to political party committees. They are approximately 20 times more than the limits affirmed in *Shrink Missouri* for non-party, ideologically-based committees like Shrink Missouri Government PAC. *Compare* Mo. Rev. Stat. § 130.032.4 and 130.032.2.[1] They apply separately to each political party committee, including regional and local party committees, of which there are dozens for each major political party in Missouri. Thus it is possible for each Missouri candidate to receive more (perhaps far more) than $603,576 in party support – what petitioners characterize

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[1] The district court referred to thee party limits as "ten times higher than" the non-party limits "found constitutional in" *Shrink Missouri*. A-4. (Because petitioners omitted the district court's decision from their appendix, it is included in the appendix to this response.) "Ten times" is only an approximation; the methods used to round the party limits as they increase under an inflation factor often shift those limits, originally precisely ten times the other limits, a few dollars off the precise multiple. But the real problem with citing the "ten times" language is not its minor imprecision, but its incompleteness. The district court was referring only to the limits on cash contributions. For non-party committees, there is no distinction between "in-kind" and cash contributions. But party committees, in addition to the maximum cash contribution, can make an "in-kind" contribution of equivalent value. Mo. Rev. Stat. § 130.032.4. Thus, Shrink Missouri Government PAC can give a candidate cash *and* "in-kind" support with a total value of only a tenth of what a party committee can give in cash alone.

as the maximum allowed under federal law.[2]

The particular events leading to this, the second petition for writ of certiorari filed in this case (*see* No. 00-1136), began on January 24, 2000, when this Court upheld Missouri's limits on contributions by individuals and non-party committees in *Shrink Missouri*. Respondents ("the State" herein) immediately moved to vacate the preliminary injunction. Shortly afterwards, the State served a motion for summary judgment based on the rule that this Court had stated in *Shrink Missouri* – a rule derived from *Buckley v. Valeo*, 424 U.S. 1 (1976). Thus the State argued that the imposition of its limits on contributions by party committees did not create "a system of suppressed political advocacy," 528 U.S. at 396, and that the limits were not "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless," *id.* at 397.

To support its motion, the State presented data from past Missouri campaigns, comparing those before with those after contribution limits were imposed. Petitioners responded with a few affidavits from individual party officials and candidates. That response did not create a genuine issue as to any fact material to the *Buckley-Shrink Missouri* test. As the district court determined,

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[2] To reach that figure, petitioners combine the amounts allowed to the national party committee and to the state party committee. *See* Petition at 8 n. 1. But when they then calculate the maximum contribution permitted in Missouri (Petition at 9, n. 2), they ignore all other committees, repeatedly giving as the total contribution allowed from any "political party" what is actually the total allowed for each Missouri party committee.

> the undisputed evidence demonstrates that campaign expenditures by candidates have increased in some cases and decreased in others following the imposition of contribution limits. Contrary to plaintiffs' assertions, this evidence does not create a factual dispute precluding summary judgment. Rather, it establishes that, whatever the source of decreased spending, contribution limits have not suppressed political advocacy system-wide or rendered contributions pointless, especially when overall spending remains quite high in absolute terms.

A-21. The district court found that the "anecdotal evidence" provided by petitioners did not "'point up a system of suppressed political advocacy.'" A-22, quoting *Shrink Missouri*, 528 U.S. at 396.

> At best, these stories are isolated examples of alleged suppression that still do not amount to the system-wide failure required under [*Shrink Missouri*]. At worst, they are simply speculation about the effects of Missouri's contribution limits without any evidence of causation.

A-22. Because the anecdotes were insufficient to create a genuine issue of material fact, the district court entered judgment under Fed. R. Civ. P. 56.[3]

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[3] Petitioners imply there is something helpful in a compilation of Missouri Republican Party contributions the State made in preparation for a merits hearing. Petition at 11-12. But that suggestion's lack of substance is demonstrated by omission: petitioners identify no information would create a genuine issue of material fact material.

For 17 months after *Shrink Missouri* was decided, petitioners' position was not that the Missouri experience with contribution limits demonstrated a violation of the *Buckley-Shrink Missouri* test. They argued, instead, that the Party was constitutionally entitled to more (by implication, more than 20 times more) latitude than are other, non-party committees. In reversing the grant of summary judgment, the U.S. Court of Appeals for the Eighth Circuit initially accepted that argument. It expressly differentiated between the imposition of limits on individuals and committees generally and the imposition of limits on political party committees. Petition Appendix (Pet. App.) at 14a-15a.

But this Court rejected that entire line of argument in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado Republican II*"). This Court then granted the State's petition for writ of certiorari in this case, vacated the first court of appeals decision, and remanded the case for reconsideration. Order of June 29, 2001, in No. 00-1136. On remand, the court of appeals observed that *Colorado Republican II* "effectively undermine[d its] previous conclusion." Pet. App. at 4a. The court of appeals then affirmed the district court's decision, and thus upheld Missouri's limits on contributions by political party committees. *Id.* at 8a. The court reminded petitioners of something that they, as shown by their decision to omit reference to it, would have this Court forget:

> [T]he Missouri Republican Party, in common with other political parties in Missouri, continue[s] to have substantial avenues for expressing their support of their candidates and for maintaining political and ideological solidarity with them.

Id. at 6a, citing *Colorado Republican Campaign Comm. v.*

FEC, 518 U.S. 604, 616 (1996) (*Colorado Republican I*) (opinion of Breyer, J.).

REASONS FOR DENYING THE WRIT

1. Petitioners cite no conflict between the decision below and that of any other court. Indeed, the only other courts to consider the constitutionality of comparable state laws concluded, as did the Eighth Circuit, that those laws are constitutional. *State of Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597, 625-26 (Alaska 1999), *cert. denied* 528 U.S. 1153 (2000); *Citizens for Responsible Government v. Buckley*, 60 F.Supp.2d 1066, 1095 (D. Colo. 1999), vacated, *Citizens for Responsible Government v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Landell v. Sorrell*, 118 F. Supp. 2d 459, 486-87 (D. Vt. 2000). That unanimity belies the need for the Court to consider this case.

2. Unable to find a direct conflict with a decision by any other court, petitioners instead allege an oblique incon-sistency between the decision below and two of this Court's precedents, *Shrink Missouri* and *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2000). The point that petitioners draw from those precedents is that there must be "a case specific inquiry to determine the validity of Missouri's party limits." Petition at 8. Curiously, they did not insist on such an inquiry when they argued to this Court fourteen months ago that it should deny certiorari in No. 00-1136, in which the State sought review of a court of appeals decision holding unconstitutional Missouri's limits on party contributions to candidates, despite the absence of a "case specific inquiry" of the sort that petitioners now insist is required.

Now, petitioners entirely ignore the extent of the district court's inquiry. They treat this as if it were the first Missouri case, ignoring the findings in *Shrink Missouri* and "the

campaign finance data submitted [to the district court] by both parties, which includes evidence presented to the Supreme Court in" *Shrink Missouri*. A-21. They fail to identify any evidence that could lead any court "to find that [this Court's] conclusions in [*Shrink Missouri*] do not apply with equal force" to the campaigns that were the subject of petitioners' anecdotal submissions. A-20. In fact, the evidence before the district court exceeded the evidence before the district court in *Shrink Missouri*, and was sufficient to support both the district court's and the court of appeals' decisions.

Petitioners nonetheless insist upon a particular finding by the lower courts as to "'[t]he degree to which speech is suppressed . . . under'" Missouri's scheme. Petition at 11, quoting *Lorillard*, 533 U.S. at 563. But in their insistence, they drag a single phrase from *Lorillard* well out of its proper context. This court said:

> The degree to which speech is suppressed – or alternative avenues for speech remain available – under a particular regulatory scheme tends to be case specific. See, *e.g.*, [*City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 53-54 (1986)]. And case specific analysis makes sense, for ... the impact of a restriction on speech will undoubtedly vary from place to place.

533 U.S. at 563. Both *Shrink Missouri* and this case, of course, involve the same "regulatory scheme" and the same "place." The court of appeals merely recognized that when the holding in *Colorado Republican II* is added to the mix of the holding in *Shrink Missouri* and the data regarding campaign spending submitted to the district court, there is, as the district court held, no basis for rejecting Missouri's limits on party contributions. *See* A-20-A-22 & n. 7. That is particularly true where, as per

this Court's holding in *Colorado Republican I*, political parties are free to make independent expenditures – an obvious "alternative avenue for speech."

In following *Shrink Missouri* and upholding Missouri's more generous limits on party contributions, the court of appeals did not create a new rule permitting "generic approval of all party contribution limits." Pet. at 15. Its decision is specific to Missouri, to the party limits now in place, and to the manner in which they have affected Missouri campaigns. The holding leaves open the possibility of challenge to another set of contribution limitations. It even leaves open the possibility of a renewed challenge to these limits – when, if ever, a plaintiff shows that conditions have changed so that the limits create "a system of suppressed political advocacy" or that they "drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Shrink Missouri*, 528 U.S. at 397.

3. Petitioners' contention that the decisions in this case have created a "significant miscarriage of justice" meriting immediate consideration (Petition at 16) cannot be reconciled with their own recent behavior. The ultimate results of the application of the law, now upheld, to these candidates has yet to be determined. Enforcement was enjoined until the Eighth Circuit ruled on remand from this Court. Once the injunction was lifted, the Commission notified the petitioners of the amounts due and owing under the law. Without waiting for the State to sue to enforce the assessments, petitioners challenged them. All petitioners filed suit in the Circuit Court of St. Louis County, *Pierce, et al., v. Donahue, et al.*, No. 02CC-001042. Petitioners Zahnd and Keith also filed complaints in Missouri's Administrative Hearing Commission, Nos.02-0387 and 02-0389. Those proceedings are just getting underway. The suggestion that absent action by this Court there will be a "significant miscarriage of justice" is, at best, premature.

Moreover, whatever the ultimate impact of the Missouri law on these petitioners, it will be the result of their own willful behavior. They made and accepted contributions over unambiguous statutory limits, at a time when those limits had never been challenged in any court. Their choice to proceed was a studied one, made in order to advance their own interests. The benefits they gained by spending, during the waning days of their campaigns, large sums that were illegally contributed cannot be taken away. If there are counterbalancing sanctions, they will be ones that anyone who read the statute could and should have anticipated.

CONCLUSION

For the reasons stated above, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

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